

Incident

In our previous issue, the Journal devoted considerable space to the introduction of the "incident" as a genre in the study of international law. As explained in that issue, an incident is an international dispute that has been appraised by relevant international actors for its lawfulness, but in an informal, nonjudicial setting, and which shapes or reinforces elite expectations about lawfulness. Readers are referred to Volume 10, Issue 1 of the Journal for a detailed treatment of the genre and its methodology, together with four case studies. With this issue, we introduce the incident study as a regular section of the Journal.

The Argentine Invasion of the Falklands and International Norms of Signalling

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I. Problem

Among the forms of communication through which states conduct their relations is the tacit exchange of messages, or "signalling."¹ For example, when state A temporarily recalls its ambassador from state B, established norms which are used by the international community to interpret signals lead state B to see the act as a message of A's displeasure at the current course of their relationship. Similar interpretive norms are used to ascribe increasing seriousness to the complete withdrawal of an ambassador, and finally to the rupture of diplomatic relations. In the years preceding the Falklands² War of 1982, the United Kingdom and Argentina exchanged signals concerning their dispute over the legal sta-

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1. "There are many ways other than verbal declarations by which states may communicate their intentions." G. SNYDER, *DETERRENCE AND DEFENSE: TOWARD A THEORY OF NATIONAL SECURITY* 252 (1961). The term "signals" here means "statements or actions the meanings of which are established by tacit or explicit understandings among the actors." R. JERVIS, *THE LOGIC OF IMAGES IN INTERNATIONAL RELATIONS* 18 (1970). Examples of signals include "diplomatic notes, military maneuvers, extending or breaking diplomatic relations, and choosing the shape of a negotiating table." *Id.*

2. Argentina refers to these islands as *Las Islas Malvinas*. The choice of the term "Falkland Islands" throughout this article is made for convenience only. It does not reflect a judgment on the merits of either party's sovereignty claim. See Reisman, *The Struggle for the Falklands*, 93 *YALE L.J.* 287, 287 n.1 (1983).

tus of the Falkland Islands. Generally accepted interpretive norms indicate that British signals conveyed an *animus derelinquendi*—a willingness to abandon—with respect to the Falklands, while Argentine signals conveyed increasing Argentine authority over the islands. Argentina relied to some extent upon the British signals to calculate that the United Kingdom would not attempt a reoccupation of the islands after their occupation by Argentina.³ The Argentine estimate of British intentions proved incorrect, and the result of that misinterpretation was a costly war and the fall of the Argentine government.

Did Argentina misinterpret British signals? Are international norms of signalling so unclear that both states disagreed in good faith on the meaning of their respective signals? Did this failure of tacit communication norms weaken those norms? What does that failure indicate about the place of signalling norms in the international legal system?

This Study will first present a summary of the facts surrounding the Falklands War. It will then discuss Argentine and British claims con-

3. In Jervis's sense, *see supra* note 1, the meaning of the signals at issue in this Article will be ascertained with reference to the system of customary international norms on the acquisition of territorial title through displays of authority and acquiescence. According to one such norm, where two states dispute sovereignty over a territory and one of them fails to object to a multilateral agreement explicitly referring to the territory in dispute as belonging to the other state, the first state is held to have acquiesced to a display of authority by the second state over the disputed area. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J., ser. A/B, No. 53, at 68-69 (Judgment of Apr. 4, 1933). *Cf. Islands of Palmas Case (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829 (1928) (Dutch displays of authority over an island and effective Spanish acquiescence in such displays established Dutch title, weakening a claim of the United States as pretended successor to Spain). Similarly, British failure to object to United Nations General Assembly Resolution 2065, which urged Anglo-Argentine negotiations over the Falklands after identifying the islands as territories in the process of decolonization, could reasonably be seen as a British signal of acquiescence in the evolution of Argentine title to the Falklands. G.A. Res. 2065, 20 U.N. GAOR Supp. (No. 14) at 57, U.N. Doc. A/6014 (1965). *See* L. SCHOPEN, H. NEWCOMBE, C. YOUNG & J. WERT, *NATIONS ON RECORD: UNITED NATIONS GENERAL ASSEMBLY ROLL-CALL VOTES (1946-1973)*, at 200, 442 (1975) (United Kingdom vote abstaining from General Assembly Resolution 2065).

It cannot be doubted, however, that the British signal in that instance was ambiguous. Yet, despite some ambiguity, certain types of signals have more potency than verbal declarations because of what Snyder calls "the accretion of custom and precedent." G. SNYDER, *supra* note 1, at 254. For example, "[i]t is a convention of international life that when a country starts maneuvering its forces clearly for demonstrative purposes, its patience is wearing thin, or it really 'means business.'" *Id.* Against this background of international practice, when Argentine naval vessels fire upon foreign ships in Falklands waters, that incident may be deemed on grounds of territorial defense to send a signal to Britain that Argentina "means business." When Britain fails to respond to those Argentine actions, such behavior sends a signal of British acquiescence.

There must be a distinction between the problem at issue here, which centers on whether Britain communicated to Argentina an *animus derelinquendi* regarding the Falkland territories, and a separate inquiry into whether on April 1, 1982, Argentina possessed better title to those territories than Britain. The latter determination would have been made by a competent tribunal had the parties repaired to one. The Argentine claim presented here alleges that Brit-

cerning the pattern of signals preceding the Argentine attack, and consider whether those claims are based on conflicting conceptions of lawfulness. Finally, the Study will examine the outcome of the incident, present the international appraisal it received, and assess its impact upon legal norms regarding the ongoing process of tacit communication. The Study concludes that the incident weakened established norms of signalling, and that in substantial part the failure of tacit communication here lay in both the inherent imprecision of signals and in the jurisprudential assumption underlying the norms that group actors generally behave rationally.

II. Facts

The United Kingdom and Argentina have disputed sovereignty over the Falkland Islands⁴ since at least 1833, when British warships evicted Argentine settlers and lowered the Argentine flag.⁵ The latest in a long-running series of attempts to resolve that dispute, in fact, failed only about a month before the war began. As late as February 27, 1982, Argentine and British diplomats met in New York to negotiate the future of the archipelago but emerged without satisfactory results.⁶ In March, British intelligence repeatedly warned Prime Minister Margaret Thatcher that some military confrontation appeared unavoidable in the wake of that diplomatic failure.⁷

Those intelligence assessments were vindicated on April 2, 1982, when Argentine forces occupied the islands and established military control

ain reneged on the tacit understanding between the parties that had developed over two decades of signalling.

4. The Falkland Islands lie in the South Atlantic, some 772 kilometers north-east of Cape Horn. They comprise 200 islands and cover a total land area of 11,961 square kilometers. There are two large islands, East Falkland and West Falkland. Apart from a number of small islands, the Dependencies consist of South Georgia, 1287 kilometers east-south-east of the Falkland Islands, and the uninhabited South Sandwich Islands, some 756 kilometers south-east of South Georgia. Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 4 U.N. GAOR Supp. (No. 23) at 20, U.N. Doc. A/33/23 Rev. 1 (1980) [hereinafter cited as Report of the Special Committee]. The population of the Falklands and Dependencies is mainly of British origin, and numbered less than 2000 in April 1982. N.Y. Times, Apr. 3, 1982, at A6, col. 4. They are governed by a Governor appointed by the British government, a six-member Executive Council, and an eight-member Legislative Council comprised of six locally elected members and two appointed by the Governor. *Id.*

5. M. HASTINGS & S. JENKINS, *THE BATTLE FOR THE FALKLANDS* 5-6 (1983); C. SEGRETI, *TRES ARCHIPELAGOS ARGENTINOS* 108-10 (1983).

6. SUNDAY TIMES OF LONDON INSIGHT TEAM, *WAR IN THE FALKLANDS* 21-30 (1982) [hereinafter cited as *WAR IN FALKLANDS*].

7. *Id.* at 71 ("British [intelligence] officials concluded that . . . Argentina was preparing to invade. They even predicted the exact date of the invasion.").

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over them.⁸ The next day the Prime Minister faced an emergency session of the House of Commons ringing with demands for the resignation of key ministers.⁹ She asserted "that the Falklands Islands and their dependencies remain British territory," defended the "democratic rights of the islanders" to remain under British rule, and pledged "to see that the islands are freed from occupation and are returned to British administration at the earliest possible moment."¹⁰ To pursue that objective she announced that a large Royal Navy task force would leave for the Falklands in two days.¹¹ Within 24 hours she had accepted the resignations of the Foreign and Commonwealth Secretary, Lord Carrington, and his two principal assistants on Falklands matters.¹²

In Argentina, the events of April 2 were received with public jubilation and general support for the governing military council led by President Leopoldo Galtieri.¹³ Although Argentine Foreign Minister Nicanor Costa Méndez had envisioned the attack as a "short coup" to create a diplomatic crisis and accelerate the process of decolonization,¹⁴ President Galtieri declared to cheering crowds that "not one meter would ever be given back to the invaders."¹⁵

The international community also responded to the crisis. The United Nations Security Council adopted Resolution 502 on April 3, demanding an immediate cessation of hostilities and a withdrawal of all Argentine forces, and calling for a diplomatic resolution.¹⁶ The European Economic Community agreed on April 9 to oppose the Argentine invasion and recommended economic sanctions.¹⁷ Its member states quickly banned all

8. HOUSE OF COMMONS, THE FALKLANDS CAMPAIGN 4 (1982) [hereinafter cited as FALKLANDS CAMPAIGN].

9. N.Y. Times, Apr. 4, 1982, at A1, col. 6. In the view of certain Members of Parliament in the Prime Minister's own party, the invasion placed in question the Prime Minister's survival in office. *Id.* at A18, col. 3.

10. FALKLANDS CAMPAIGN, *supra* note 8, at 5.

11. *Id.* at 7-8.

12. WAR IN FALKLANDS, *supra* note 6, at 100-01.

13. M. HASTINGS & S. JENKINS, *supra* note 5, at 75. Only a few days earlier, serious civil disturbances in Buenos Aires, under a labor slogan of "Peace, Bread, and Jobs," led to four hundred arrests. La Prensa, Mar. 31, 1982, at 1, cols. 5, 8.

14. Interview with the Honorable Nicanor Costa Méndez, Foreign Minister of Argentina, in New Haven (Apr. 27, 1984) (notes on file with the *Yale Journal of International Law*) ("Argentina's plan was not to fight a war with Britain, nor was it Argentina's decision to take over and maintain the islands, but to have a very short coup to call attention from [sic] the Secretary General or big powers to intervene").

15. WAR IN FALKLANDS, *supra* note 6, at 122 (quoting senior official's account of Galtieri's speech). According to the *Sunday Times* of London, a senior Argentine official revealed to them that Costa Méndez "wanted to resign" when he heard Galtieri's balcony bravado. *Id.* Galtieri reportedly told Costa Méndez: "Don't worry, we can't lose!" *Id.*

16. *Id.* at 112.

17. *Id.* at 120-21.

imports from Argentina.¹⁸ Among Britain's allies, only the United States expressed any reluctance to support the U.K.

U.S. policy was tied to efforts to mediate a peaceful solution to the crisis. Secretary of State Alexander Haig took the initiative and engaged in shuttle diplomacy between April 8 and 29.¹⁹ When that effort failed, President Reagan declared on April 30 that the United States would make available military supplies to Britain and impose economic sanctions on Argentina.²⁰

The failure of negotiations and the alignment of powerful industrial nations behind Britain accompanied the opening of the British military campaign to recapture the islands. Military operations proceeded rapidly. British forces seized South Georgia on April 25.²¹ British task force aircraft bombed the airstrip at the Falklands's capital, Stanley, on May 1.²² The sinking of a large Argentine cruiser on May 2 with its accompanying heavy loss of life confirmed that a diplomatic crisis had become a war.²³ Heavy land, sea, and air warfare continued until Argentine forces surrendered on June 14.²⁴

Not surprisingly, the two countries blame each other for the immediate causes of the outbreak of hostilities. The following section examines what the two states could muster in support of conflicting signalling claims.

III. Conflicting Claims

Neither Argentina nor Britain made official claims with respect to signalling in connection with the war.²⁵ However, the lack of formal claims is no obstacle to this analysis, since the concern here is with using the dispute to judge its impact on international norms of signalling. Norms regarding the process of signalling shaped the Argentine decision to invade the Falklands. Since Argentina took the first step in the recent hostilities, one can analyze the conflict by proposing a signalling claim on Argentina's behalf and estimating whether the circumstances in which that step was taken support the terms of the imputed claim. One should also advance a counterclaim in Britain's defense and determine whether

18. *Id.* at 121. See also C. KANAF, *LA BATALLA DE LAS MALVINAS* 131 (1982).

19. *WAR IN FALKLANDS*, *supra* note 6, at 135-43.

20. M. HASTINGS & S. JENKINS, *supra* note 5, at 141-42.

21. *WAR IN FALKLANDS*, *supra* note 6, at 152-53.

22. *Id.* at 160-61.

23. A. GAVSHON & D. RICE, *THE SINKING OF THE BELGRANO* 101-03 (1984).

24. See generally C. KANAF, *supra* note 18; M. HASTINGS & S. JENKINS, *supra* note 5.

25. Argentine Foreign Minister Costa Méndez made no signalling claim on April 3, 1982, during his speech to the United Nations Security Council, see *infra* note 64.

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its terms find support in the circumstances of the incident. Having established that both claims find support in the circumstances of the incident, one can proceed to evaluate which claim prevailed in the outcome of the incident. Learning why one side prevailed will illuminate the role of signalling norms in the incident and whether the incident strengthened or weakened them.

The unarticulated Argentine claim can be constructed as follows:

The signals long preceding our decision to invade the Malvinas told us that Britain was not really serious about its sovereignty claim, was prepared to acquiesce to displays of increasingly sovereign Argentine authority over the islands, and was indeed pursuing a policy of abandonment with respect to its sovereignty claim. In departing from its tacitly communicated policy, Britain violated international norms of tacit communication or "signalling."

This claim derives from the generally accepted view that the Argentine leadership never expected a strong British or international response and that its decision was based on that expectation.²⁶

The British government would not be likely to concede any merit in the Argentine claim advanced here.²⁷ Agreeing publicly would have been very costly at home, amounting to a confession of inconsistency, irresponsibility, or a clandestine betrayal of the official national policy towards the islands. The British demurrer, had it been publicly articulated, would have suggested that the Argentine leadership was wrong to draw inferences of British acquiescence from the events leading up to the invasion. The facts examined below make clear the disingenuousness of such a counterclaim. The British government could more convincingly justify its reaction to the Argentine seizure as follows:

26. In support of this formulation of the Argentine claim, Foreign Minister Costa Méndez told the author that Argentina invaded in part because "we had signals that Britain would not send the Fleet because it would be very expensive, would affect the commitment to NATO, and even if sent the results were not all for sure." Interview with the Honorable Nicanor Costa Méndez, *supra* note 14. He also stated that those signals from Britain

were rather confusing. They wanted to have the cake and eat it too. They wanted to spend nothing, didn't protest the Argentine takeover of the Sandwich Islands and did not protest in the case of the Russian fishing boats. The Foreign Office and the British Government were divided. But we knew that even if the signals were confusing the negotiations had no future.

Id. See also M. HASTINGS & S. JENKINS, *supra* note 5, at 60 ("Costa Mendez also continued in his firm view that the diplomatic consequences could be contained and no military reoccupation by Britain would be attempted. In his defense, it should be said that there were sound empirical grounds for his view. . . ."). The Argentine Foreign Ministry may also have counted on Soviet support at the United Nations. *Id.* at 48-49.

27. Prime Minister Thatcher declared to the House of Commons on April 3, 1982, that the Argentine invasion "has not a shred of justification and not a scrap of legality." FALKLANDS CAMPAIGN, *supra* note 8, at 4.

Perhaps Argentina was justified in interpreting our previous lack of resolve on behalf of our official sovereignty position as an indication of our willingness to allow some weakening of our title, but Argentina went too far in concluding that those precedents would permit them to invade the Falklands openly without a stern British response.²⁸

Britain might counterclaim that the Argentine claim was a rationalization, and that the junta had decided to invade as a result of domestic unrest unrelated to any theories of right or perceptions of British signals.²⁹ This potential counterclaim, accusing the Argentines of hypocrisy, will not be treated here. Unless one thinks that it behaved totally irrationally, the junta's decision to order military action required a prospect of success even if it was primarily intended to distract attention from domestic problems. The key gamble depended on the strength of British and international reaction as gauged from various signals.

The credibility of the claims imputed to Argentina and Britain must be ascertained through careful examination of the pattern of signals in the years before the war. One starting point is the 1965 United Nations resolution that first classified the Falklands as territories in the process of decolonization.

28. Shortly after her "not a scrap of legality" remark on April 3, 1982, *id.*, the Prime Minister more soberly noted that:

[t]here had, of course, been previous incidents affecting sovereignty before the one in South Georgia In December 1976 the Argentines illegally set up a scientific station on one of the dependencies within the Falklands group — Southern Thule. The Labour Government attempted to solve the matter through diplomatic exchanges, but without success. The Argentines remained there and are still there

Id. at 5. The Prime Minister's remarks hint at a recognition that Britain had acquiesced in the Argentine seizure of Falklands territory on prior occasions, but she was apparently drowned out by protest before she could clearly distinguish between those earlier Argentine derogations of British claims and the one at issue on April 3, 1982.

29. There could be other British responses to the Argentine claim. The first is a possible British counterclaim accusing the Argentines of being the ones who violated the norms of signalling. The official British investigation considered such a counterclaim when it stated that "Argentina had previously made threatening noises, accompanied by bellicose press comment, and indeed backed up its threats with aggressive actions, without the dispute developing into a serious confrontation." THE RT. HON. THE LORD FRANKS, CHAIRMAN, FALKLANDS ISLANDS REVIEW—REPORT OF A COMMITTEE OF PRIVY COUNSELLORS, para. 296 (1983) [hereinafter cited as FRANKS REPORT]. This allegation suggests that Argentina signalled to the United Kingdom that it would not invade the Falklands irrespective of appearances.

The *Franks Report* dismissed this counterclaim. The Report noted that this view of Argentine intentions was unfounded and exerted an undue influence on British policymaking. *Id.* Indeed, almost each case of Argentine sabre-rattling at official levels was followed up by some sort of material affront to British sovereignty. The severity of these affronts increased over time.

Another possible British counterclaim would be that the British strategy of "understated response" was a rational policy not intended to signal acquiescence to Argentine aggression, but meant instead to reduce the risk of armed conflict. This theory lacks merit because the facts presented here show that the British elite knew at the highest levels how dangerously its actions were being interpreted in Argentina.

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A. *Operation Condor and its Aftermath*

United Nations General Assembly Resolution 2065 of December 16, 1965,³⁰ from which the United Kingdom abstained, linked the Falklands to the international effort to decolonize, and invited British-Argentine negotiations on the subject. A year later, in September 1966, "Operation Condor" revealed the vulnerability of the Falklands and their isolation from British power. Operation Condor involved the hijacking by twenty armed Argentine civilians of an Argentine government DC-4 airplane to Port Stanley, the capital of the Falkland Islands. Massive demonstrations in Buenos Aires supported this apparently unofficial action.

Operation Condor was an unofficial Argentine signal that the Falklands were vulnerable to paramilitary incursions and that Argentina could back up its territorial claim with military force.³¹ The British government had foreseen such a signal at least eighteen months before Operation Condor. A March 1965 British Joint Intelligence Committee report estimating the vulnerability of the islands singled out such adventurist, unofficial action as the type of incident most likely to induce a radical and rapid change in Argentine public opinion and official policy.³² It remains unknown whether the Argentine government sent the Operation Condor signal, but it is at least the case that some group in Argentina with access to weapons was clearly signalling a strong commitment to Argentine sovereignty over the Falklands.

The British government's actions in the wake of Operation Condor clearly indicate that it received the signal. The immediate British response was to increase its military presence on the Falkland Islands from one officer and five men to a full platoon (about 40 men)—a number which remained roughly constant until the 1982 invasion.³³ However, diplomatic acquiescence far overshadowed the signal sent by the increased military presence. Within six months of the incident, the British government proposed a "sovereignty freeze" for a minimum of thirty years, after which the Islanders would be free to choose between British and

30. G.A. Res. 2065, *supra* note 3.

31. See FRANKS REPORT, *supra* note 29, para. 21. It makes little difference whether the operation was an act of official Argentine policy, planned with the knowledge and participation of the Foreign Ministry and the President of the Republic, or whether prior knowledge of the operation was limited to lower functionaries or a small group elsewhere within the politico-military structure. The operation signalled to Britain the continued immediacy of the Argentine claim, and the British response signalled the remarkable weakness of British commitment to its claim.

32. FRANKS REPORT, *supra* note 29, para. 19. For a description of the role and composition of the Joint Intelligence Committee, see *id.* Annex B paras. 13-15.

33. FRANKS REPORT, *supra* note 29, para. 21. The number did not increase substantially before April, 1982. M. HASTINGS & S. JENKINS, *supra* note 5, at 72.

Argentine rule.³⁴

Argentina rejected the British offer,³⁵ thereby reemphasizing the seriousness of its legal claim. The British government responded in March 1967 by telling Argentina for the first time that Her Majesty would immediately "cede sovereignty" of the Falklands under certain conditions.³⁶ Britain first stated to Argentina that it would condition its recognition of Argentina's sovereignty on the Falkland Islanders' "wishes."³⁷ Negotiations then stalled when the Falkland Islands Council alarmed the British Parliament with allegations of an impending cession of sovereignty, provoking widespread political opposition in Britain.³⁸ The British government finally reached an agreement with Argentina in August 1968 on a Memorandum of Understanding regarding the official conditions for the cession of British sovereignty. It stated concern for the Islanders' "interests" instead of guaranteeing their "wishes."³⁹

These events establish that the signal sent by Operation Condor significantly affected subsequent policy decisions at the highest levels of the British government. Argentina benefited relatively quickly from Operation Condor, even though the British public opposed diplomatic concessions on sovereignty. The British concessions in the months after Operation Condor amounted to a British signal that Argentine para-military affronts to British sovereignty would weaken the British claim to sovereignty, as well as the Islanders' claim to self-determination.

B. *Deteriorating Relations*

The new British policy of negotiating away Her Majesty's sovereignty claim encountered increasingly sharp political opposition and critical press coverage. Following a rebellion by backbenchers on December 11, 1968, the British Cabinet abandoned the Memorandum of Understanding as a basis for settlement of the dispute.⁴⁰

34. FRANKS REPORT, *supra* note 29, para. 22. A report submitted to the British Defence and Overseas Policy Committee prior to these negotiations stated that Argentina could easily occupy the islands by force. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* para. 23. Publication of the Memorandum of Understanding "was to be accompanied by a unilateral" British government statement which made conformity with the Islanders' wishes an absolute condition for recognizing Argentine sovereignty. *Id.* para. 24.

40. *Id.* para. 25. The Cabinet based its decision to abandon the Memorandum of Understanding on the refusal of the Argentine government to insert a clause in the Memorandum making a British recognition of Argentine cession of sovereignty subject to the "wishes" of the approximately 1600 Islanders, or to link the Memorandum to the British unilateral publication statement. *Id.*

However, according to the *Franks Report*, earlier in 1968 the British government had recognized that “failure to reach an understanding with Argentina carried the risks of increased harassment of the Islanders and the possibility of an attack. The Government therefore decided to endeavor to continue negotiations with Argentina while making clear the British attitude on sovereignty.”⁴¹ The Foreign and Commonwealth Secretary told Parliament on December 11, 1968, that Britain would continue to negotiate.⁴²

The British government pursued this negotiation strategy from 1968 until 1974.⁴³ Discussions from 1969 to 1971 continued under a “sovereignty umbrella” and focused on improving communications and other ties between Argentina and the Falkland Islanders.⁴⁴ Argentina’s policy during this period apparently was to cooperate with British efforts to tie the Islands more closely to the Argentine mainland. During those two years of relative harmony, the two governments reached accords on several issues, including the provision of scholarships for Falklanders wishing to study on the Argentine mainland, the construction of an airstrip to link Port Stanley to Argentina, the issuance of Argentine immigration documents to the Islanders, reciprocal exemptions from duties and taxes, and an exemption for Islanders from Argentine military service.⁴⁵ British willingness to enter into these agreements supports the Argentine claim that the agreements indicated a British readiness to allow the Falklanders to become Argentine subjects.

Even as Argentina began to implement these cooperative ventures, it pressed for a resumption of talks on sovereignty and conditioned its willingness to discuss further ties with the Islanders on the British government’s acceptance of sovereignty negotiations.⁴⁶ An impasse on the sovereignty issue led Argentina to seek and obtain the passage in 1973 of UN General Assembly Resolution 3160 urging renewed negotiations on sovereignty in 1973.⁴⁷

At the end of that year, British intelligence reported for the first time that the Perón government might be preparing contingency plans for the military occupation of the Falklands.⁴⁸ As a result of these develop-

41. *Id.*

42. OFFICIAL REPORT, HOUSE OF COMMONS, 11 December 1968, cols. 424-34.

43. FRANKS REPORT, *supra* note 29, paras. 25-30.

44. *Id.* para. 26. For example, in December 1971 the two governments issued a joint statement establishing new patterns of cooperation between the Falklands and Argentina. *Id.*

45. *Id.*

46. *Id.* para. 27.

47. *Id.* para. 129. See G.A. Res. 3160, 28 U.N. GAOR Supp. (No. 30) at 108, U.N. Doc. A/9030 (1973).

48. FRANKS REPORT, *supra* note 29, para. 32.

ments, the British Defence Committee proposed exploring the idea of a British-Argentine condominium over the Falklands. The Falklands Council indicated that it would not object to the proposal.⁴⁹ Before Argentina could pursue this new initiative, the British told Argentina in August 1974 that the Islanders' refusal to attend the negotiations on condominium, even though the Falklanders did not object per se to their taking place, made such talks pointless.⁵⁰ The condominium episode supports the British claim because it indicated that the Foreign and Commonwealth Office would continue to follow the formula in the Memorandum of Understanding and safeguard Islander interests. Abandoning the islands without Islander participation would require a *formal* policy change in Britain.

In December 1974, the Argentine newspaper *Crónica* mounted a campaign advocating an invasion of the Falklands.⁵¹ In April 1975, the British Ambassador to Buenos Aires delivered a warning to Argentine Foreign Minister Vignes that the U.K. would respond militarily to any Argentine invasion.⁵² Argentina confirmed indications that its policy was moving from one of cooperation to a more confrontational posture in July 1975 when it rejected a British proposal for the joint economic development of the South Atlantic territories.⁵³ Foreign Minister Vignes suggested linking any such agreement to a transfer of sovereignty plus a leaseback to Britain for some years.⁵⁴ He also suggested that Argentina occupy South Georgia and the South Sandwich Islands. Britain found this unacceptable, and negotiations stalled.⁵⁵ These official exchanges offer some foundation for the British claim. They indicate a stiffening of the British government's attitude after the domestic public debate over condominium. This stiffening might properly have been interpreted by the Argentines as a signal that the British sovereignty claim would not be abandoned, diplomatically or militarily, without Islander agreement.

C. *The RSS Shackleton Incident*

In October 1975, the United Kingdom announced its decision to commission a report, to be directed by Lord Shackleton, on the long-term economic potential of the islands.⁵⁶ This provoked a sharp response

49. *Id.* paras. 29, 30.

50. *Id.* para. 30.

51. *Id.* para. 31.

52. *Id.*

53. *Id.* para. 33.

54. *Id.*

55. *Id.*

56. *Id.* para. 34.

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from Argentina's Foreign Minister, who warned British Prime Minister Callaghan on January 2, 1976, that in the absence of further negotiations their countries would "rapidly mov[e] towards a head-on collision," and that "[the Argentine] government could accept no responsibility for such an outcome."⁵⁷ British attempts at conciliation failed to temper the aggressiveness of subsequent statements by the Argentine government and print media.⁵⁸

The situation worsened in February when an Argentine destroyer fired shots at the unarmed British research ship *RSS Shackleton* seventy-eight miles south of Port Stanley.⁵⁹ British intelligence reported that the decision to attack the *Shackleton* had been made in Buenos Aires six weeks earlier, but that the Argentine armed forces were nevertheless opposed to a full-scale military invasion that might help President Isabel Perón stay in power.⁶⁰

The firing on the *Shackleton* came after Britain's decision to withdraw its only armed vessel in the South Atlantic, the ice patrol ship *HMS Endurance*.⁶¹ As a result of the shooting, Britain retained *Endurance* on active service in the area, subject to annual and biannual renewal.⁶² Prime Minister Callaghan also agreed to send a Royal Navy frigate to the South Atlantic.⁶³ The deployment of the frigate was the firmest response of any British government to an Argentine challenge during this period, until, of course, the decision of Prime Minister Thatcher to retake the islands in 1982.⁶⁴

57. *Id.* para. 36.

58. *Id.* paras. 37, 39. This strong Argentine reaction can be seen as a response-in-kind to earlier British diplomatic warnings not to occupy territory unilaterally. Both sides had previously signalled their opposition to unilateral actions in UN General Assembly Resolution 3160, adopted in 1973. See *supra* note 47.

59. FRANKS REPORT, *supra* note 29, para. 42. According to the *Franks Report* the presence of the *Shackleton* did not have any connection to the mission led by Lord Shackleton. *Id.*

60. *Id.* paras. 41, 42. British intelligence indicated that the Argentine decision to intercept the ship was made by the armed forces, not by the government, and that the Commander-in-Chief of the Argentine Navy had authorized firing upon the ship without causing casualties or sinking it. "The Joint Intelligence Committee assessed the purpose of the operation as being an assertion of Argentine sovereignty over the Falkland Islands and surrounding waters, in order to bring pressure to bear on the British Government to negotiate." *Id.* para. 42.

61. *Id.* para. 44. The decision resulted from the 1974 Defence Review. *Id.*

62. *Id.*

63. *Id.* para. 45.

64. The deployment was based on the continued view of British intelligence that the main Argentine threat was harassment. *Id.* para. 40. One frigate would not have been an adequate response or deterrent to Argentine military designs more serious than harassment. Nevertheless, this response was sufficiently firm to influence Argentine thinking regarding British policy in the South Atlantic. Argentine Foreign Minister Nicanor Costa Méndez dedicated four paragraphs of his Security Council speech of April 3, 1982, to his account of this incident. In it, he described the British decision as an attempt at intimidation "which constituted a real threat to my country and to the continent" Provisional Verbatim Record of the Two

The events surrounding the firing on the *RSS Shackleton* are a substantial source of support for the British signalling claim. Official Argentine use of armed force upon a symbol of British sovereignty over the Falklands—a British vessel conducting an economic resources survey in the vicinity of the islands—met with a strong British military and diplomatic response, signalling the limits of British acquiescence.

D. *The Southern Thule Incident*

Britain's ability to send an effective signal depended in part on intelligence reports of the Argentine armed forces's unwillingness to take decisive action that might bolster President Perón's popularity. The British were well aware of their own strategic constraints: a British Chiefs of Staff paper issued in February 1976, warned that an Argentine invasion would probably succeed and that Britain could repulse it only by using all of the Royal Navy's amphibious resources as well as a sizeable task force.⁶⁵ This bleak assessment of British military options led the Callaghan government to enter into a fresh round of discussions, culminating in the passage of General Assembly Resolution 49⁶⁶ in December 1976. The resolution thanked the government of Argentina for "facilitat[ing] the process of decolonization" and urged both sides to expedite negotiations.⁶⁷ The United Kingdom stood alone in opposing the resolution.⁶⁸

Against this diplomatic background, on December 20, 1976, the British "discovered the existence of an Argentine military presence" on Southern Thule in the South Sandwich Islands.⁶⁹ After inquiries from London, Argentina responded on January 14, 1977, that its intent was to establish a station on Southern Thule for future scientific investigation "within the jurisdiction of Argentine sovereignty." Argentina also expressed the hope "that nothing would cloud the 'auspicious perspectives' for negotiations," hinting that their presence on Southern Thule would not be permanent.⁷⁰ Five days later, the British government formally protested the Argentine presence "as a violation of British sovereignty," stating that Britain was "entitled to expect" prior consultation and ex-

Thousand Three Hundred and Fiftieth Meeting, U.N. Doc. S/PV. 2350 (1982). He also argued that the British deployments near the Falklands "justify and explain the actions taken of necessity by the Government of Argentina in defense of its rights." *Id.*

65. FRANKS REPORT, *supra* note 29, paras. 46, 47.

66. *Id.* G.A. Res. 49, 31 U.N. GAOR Supp. (No. 39) at 122, U.N. Doc. A/31/39 at 122 (1976).

67. *Id.*

68. FRANKS REPORT, *supra* note 20, para. 51.

69. *Id.* para. 52.

70. *Id.* para. 53.

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pressing the "hope" that the Argentine "scientific programme was being terminated."⁷¹

Shortly thereafter, on February 2, 1977, the British government decided that "the time has come to consider both with the Islanders and the Argentine Government whether a climate exists for discussing the broad issues which bear on the future of the Falkland Islands, and the possibilities of cooperation between Britain and Argentina in the region of the South West Atlantic."⁷² The British government emphasized that it still reserved its positions both on sovereignty and on the need for Islander approval of any agreement.⁷³ Within two months, the governments agreed to terms of reference for new formal discussions.⁷⁴

The outcome of the Southern Thule incident issued an even stronger signal to the Argentines. While the British responded to the *Shackleton* incident with a firm diplomatic protest and a naval deployment against Argentina, their reaction to the Southern Thule landing communicated a lack of seriousness on both diplomatic and military levels. Although *HMS Endurance* reported the Argentine landing on December 20, 1976, it was only on January 5, 1977, that the Foreign Office sought an Argentine "explanation".⁷⁵ The British took no further action until the Argentines had proffered such an explanation, thereby delaying delivery of Britain's formal protest until January 19, a month after the landing.⁷⁶ At no time did the British government make public the Argentine landing,⁷⁷ nor did it attempt any forward protest through international channels. The Southern Thule incident therefore furnishes a strong foundation for the Argentine signalling claim. Argentina intimidated the British government into stating publicly that "the time ha[d] come" to negotiate on sovereignty.⁷⁸ The success of Argentine policy probably surpassed Argentine expectations, and apparently failed to precipitate a full invasion

71. *Id.*

72. *Id.* para. 58.

73. *Id.*

74. *Id.* para. 60. The Islanders agreed to those terms of reference, but only under a "sovereignty umbrella" and with promises of full consultation with them. *Id.*

75. *Id.* para. 52.

76. *Id.* para. 53. The *Franks Report* stated that "[t]he Argentine expectation had been that the British reaction would have been stronger." *Id.* para. 54.

77. *Id.* These events did not come to public notice until May 1978. *See The Times* (London), Apr. 3, 1981, at 3, col 8.

78. *See supra* text accompanying note 72. British intelligence expected a hardening of the Argentine position in the forthcoming negotiations. Intelligence reports also indicated that the failure of Argentina to prevail in the Papal arbitration of the Beagle Channel dispute with Chile, and the lack of progress with Brazil in their River Plate Basin dispute, could only increase Argentine eagerness to press for success in the Falklands dispute. FRANKS REPORT, *supra* note 29, para. 62.

only because Argentina anticipated little if any international support.⁷⁹

E. *The Soviet and Bulgarian Incidents*

Before talks between Argentina and Great Britain resumed in New York, Argentine naval forces detained seven Soviet and two Bulgarian fishing vessels in Falklands waters during September and October 1977.⁸⁰ One Bulgarian sailor was wounded by Argentine fire.⁸¹ Admiral Anaya, Argentine Naval Attaché in London and later Commander-in-Chief of the Navy, warned the British Foreign Office that Argentine Admiral Massera had orders to sink any of the Bulgarian vessels if necessary.⁸²

The series of incidents during late September and early October 1977 did not directly involve British interests. However, the Argentine interdiction of vessels in Falkland waters amounted to a legal claim of right which necessarily implicated the British sovereignty claim. The Argentine government warned the British through diplomatic channels of similar actions in the future against "any other flag carrier and at any other place."⁸³ The boldness of the Argentine move and the failure of the British government to express strong displeasure in any significant way could have reinforced Argentine interpretations of the apparant lack of seriousness of British intentions which had already been manifested in the Southern Thule incident.

F. *The British Secret Naval Deployment of 1977*

After the attack on the Bulgarian and Soviet vessels, the British government secretly decided to deploy two Royal Navy frigates a thousand miles from the Falkland Islands and a nuclear-powered submarine in the "immediate vicinity" of the Falklands.⁸⁴ The *Franks Report* asserts that "Cabinet Committee papers show clearly that it was agreed that the force should remain covert. We have found no evidence that the Argentine Government ever came to know of its existence."⁸⁵

The British government's decision to deploy the force covertly pre-

79. *Id.* paras. 54, 56.

80. *Id.* para. 62.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* para. 65.

85. *Id.* para. 66. Then Prime Minister James Callaghan "has said that he ensured that the [naval] unit's presence was made known through undisclosed channels to the Junta of the day." A. GAVSHON & D. RICE, *supra* note 23, at 10. That signal was supposedly to have reached the Argentines through American intermediaries. *Id.* Gavshon and Rice prefer the *Franks Report's* version, particularly since it is extremely damaging to the Report's own conclusion exonerating the Thatcher Government for not foreseeing the 1982 invasion. *Id.*

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vented the action from being a signal and thus from having any effect on Argentine perceptions. This missed opportunity to signal was especially telling in that as with the “firm” British response to the *Shackleton* incident, the deployment of two ships and a submarine could not have barred an Argentine invasion in any case and could not have been designed to fulfill such a mission.⁸⁶

In any event, the force was withdrawn once the British believed negotiations were going well.⁸⁷ During subsequent negotiations the British proposed joint scientific activities in the Dependencies, a step that “would have retrospectively legitimized the Argentine presence on Southern Thule.”⁸⁸ While Islander opposition killed the proposal,⁸⁹ Argentina could reasonably claim that the proposal conveyed a signal of continued British acquiescence in Argentine displays of sovereign authority.

G. Other Territorial Developments

In the *International Herald Tribune* of November 6, 1980, the Argentine State Petroleum Company, *Yacimientos Petroleros Fiscales* (YPF), invited bids for a contract to drill for oil in an off-shore area called Magallanes Este. This area straddled the British-declared boundary line between the Falklands and Tierra del Fuego.⁹⁰ On December 9, 1980, the British government officially protested to Argentina, responding to Argentine plans to drill oil in the disputed territory.⁹¹ Approximately five months later, the British government published a notice in the *International Herald Tribune* warning oil companies of the possibility of legal action if they drilled in the disputed area.⁹²

The reaction of the Argentine government at the diplomatic level was to declare the basis of the British protest of December 9, 1980, “flatly

86. British intelligence knew that much more was needed to prevent or defeat a determined Argentine effort to seize the Falklands. FRANKS REPORT, *supra* note 29, para. 47.

87. *Id.* para. 66.

88. *Id.* para. 68.

89. *Id.* para. 69. The Islanders’s main objection was that, “unless restricted to Southern Thule, [such cooperation] would give Argentina a further foothold in the Dependencies, which would start a process leading to eventual loss of sovereignty over the Falkland Islands themselves.” *Id.*

90. See 2 A. SILENZI DE STAGNI, *LAS MALVINAS Y EL PETRÓLEO* 141 (1983). See also Report of the Special Committee, *supra* note 4, paras. 31, 32. (The United Kingdom also carried out seismic exploration around the Falklands in search of oil. The RRS *Shackleton* may have been part of this British effort.) But see *supra* note 59 (indicating no connection between the RRS *Shackleton* and Lord Shackleton’s mission).

91. A. SILENZI DE STAGNI, *supra* note 90, at 136.

92. *Id.* at 141 (quoting Lord Carrington’s statement on subject).

unacceptable.”⁹³ The Argentine Foreign Office declared that “there does not exist any boundary in the area in question, for the simple reason that the whole area corresponds to Argentine sovereignty.”⁹⁴ The Argentine government put teeth into that assertion of sovereignty by signing an agreement with the Soviet Union that provided for joint exploration and exploitation of fishing resources “in Argentine waters south of 46 south latitude, in accord with Argentine legislation in effect.”⁹⁵

On June 30, 1981, the British Parliament approved the expiry, effective March 1982, of the commission of *HMS Endurance*, the only British armed ship stationed in the South Atlantic.⁹⁶ On July 27, 1981, the Argentine Ministry of Foreign Affairs issued a communiqué warning that the question of sovereignty could no longer be deferred.⁹⁷ Lack of British counter-response, especially in view of the decision to decommission *Endurance*, would clearly support an Argentine claim that the British signalled an *animus derelinquendi* towards the Falklands.

H. *The South Georgia Incident*

In December 1981, a private party of alleged Argentine scrap metal dealers landed without authorization on South Georgia, ostensibly to inspect a disused British whaling station for which they had signed an option contract with an Edinburgh-based firm.⁹⁸ The Governor of the Falklands told the British Foreign Office on December 31 that the Argentine party on South Georgia was violating Dependencies’ legislation by its failure to obtain clearance.⁹⁹ The Foreign Office replied that the Governor should not take action which “would risk provoking a most serious incident which could escalate and have an unforeseen outcome.”¹⁰⁰ Any action or diplomatic protest would have to wait for further developments on South Georgia.¹⁰¹

Although the British Ambassador in Buenos Aires approached the Ar-

93. *Id.* at 142.

94. *Id.*

95. *Id.* at 163 (quoting text verbatim of Ley No. 22.481, Aug. 10, 1981, Protocolo de Entendimiento Entre la Secretaría de Estado de Intereses Marítimos del Ministerio de Economía de la República Argentina y el Ministerio de Pesca de la Unión de Repúblicas Socialistas Soviéticas Sobre la Colaboración en Materia Pesquera, art. 6).

96. FRANKS REPORT, *supra* note 29, para. 114. Lord Carrington, the British Foreign Secretary, had argued against the decision, warning that the presence and hydrographic tasks of *Endurance* “were an important aspect of the maintenance of the British claim to sovereignty.” *Id.*

97. *Id.* para. 97.

98. *Id.* paras. 161-62.

99. *Id.* para. 163.

100. *Id.* para. 164.

101. *Id.*

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gentine Foreign Ministry on January 6, 1982, he withheld a protest about events on South Georgia pending an Argentine investigation.¹⁰² The protest was delivered on February 9, and Argentina rejected it nine days later.¹⁰³

On March 20, the Governor of the Falklands notified the British Foreign Office that a sizable Argentine party of civilian and military personnel had arrived on South Georgia aboard a different ship. Upon landing, they had fired shots, raised the Argentine flag, and defaced a posted warning against unauthorized landings.¹⁰⁴ The British Ambassador in Buenos Aires then warned the Argentine Foreign Ministry that the incident was serious and that "the British Government would have to take whatever action seemed necessary."¹⁰⁵ The British government ordered *HMS Endurance* to sail to South Georgia. The Falklands Governor instructed the British Base Commander at Grytviken, South Georgia, to tell the Argentines to lower their flag and report to Grytviken.¹⁰⁶

On March 21, while the Argentines remained at Leith Harbor on South Georgia, the Argentine Foreign Office officially responded without apology, but expressed the hope that the British would not "exaggerate" the significance of the incident.¹⁰⁷ The Argentine naval headquarters meanwhile congratulated the ship *Bahía Buen Suceso* (the *Good Incident Bay*) on "a successful operation."¹⁰⁸

On March 23, the British Foreign Office canceled the *HMS Endurance's* orders to confront the Argentine party at Leith. Instead, hoping to avoid "provocation,"¹⁰⁹ the British ordered the *HMS Endurance* to remain at Grytviken. British Foreign Secretary Lord Carrington obtained his Argentine counterpart's agreement that removal of the party at Leith by an Argentine vessel was a "welcomed" suggestion, while Dr. Costa Méndez in turn assured Lord Carrington that he would try to obtain the necessary authorization to carry it out.¹¹⁰

Yet on March 25, the British received information that Argentine warships had been dispatched to prevent the *HMS Endurance* from evacuating the Argentine party at Leith.¹¹¹ London also learned that a second

102. *Id.* para. 165.

103. *Id.*

104. *Id.* para. 169; C. KANAF, *supra* note 18, at 18. On March 22, Falkland Islanders vandalized the Argentine government airline's office in Port Stanley. *Id.*

105. FRANKS REPORT, *supra* note 29, para. 169.

106. *Id.*

107. *Id.* para. 170. See also C. KANAF, *supra* note 18, at 98.

108. FRANKS REPORT, *supra* note 29, para. 175.

109. *Id.* para. 184.

110. *Id.* paras. 184-86.

111. *Id.* para. 193. Cf. C. KANAF, *supra* note 18, at 99-100.

Argentine ship, previously supposed to be an unarmed scientific vessel, had brought three military landing craft and a military helicopter to Leith Harbor.¹¹² The June 1981 decision to pull the *HMS Endurance* out of service was not changed, but she remained temporarily at Grytviken.¹¹³

The Argentine Commanders-in-Chief met on March 26, and the next day Dr. Costa Méndez announced that a firm decision had been reached to give the Argentine men on South Georgia "all necessary protection."¹¹⁴ That same day, the President and Commander-in-Chief of the Army, General Leopoldo Galtieri, announced to an audience of local politicians in Buenos Aires that "this year is not the most propitious one to face fundamental solutions to the political, economic, and social problems of the Nation."¹¹⁵

The absence of visible British resolve on behalf of its sovereignty claim must have confirmed the message of the Southern Thule incident to the Argentine ruling elite. British inaction also came in the context of the scheduled decommissioning of the *HMS Endurance* in March, which the British government refused to delay for budgetary reasons despite events on South Georgia.¹¹⁶ Moreover, the British Foreign Office itself was, or should have been, aware of the message which decommissioning the *Endurance* would send, since Lord Carrington had unsuccessfully argued that the retention on station of the *HMS Endurance* was important to the credibility of the British title claim.¹¹⁷

The Falkland Islands Council shared this interpretation of the decision,¹¹⁸ and it became public knowledge as part of the parliamentary debate on the 1981 Defence Review. All Argentine newspapers that reported the decision took it to mean that Britain was "abandoning the protection of the Falkland Islands."¹¹⁹ Indeed, British intelligence knew that Argentina had interpreted the decision as a deliberate political ges-

112. FRANKS REPORT, *supra* note 29, para. 193.

113. *Id.* paras. 194, 204.

114. *Id.* para. 207. See also C. KANAF, *supra* note 18, at 100.

115. La Prensa, Mar. 27, 1982, at 1, col. 1 ("El presidente habló a intendentes bonaerenses—Dijo que este año no es el más propicio para encarar soluciones de fondo para el problema político, económico y social de la Nación"). Widespread political unrest had created public speculation as to whether significant changes in domestic policy would take place. The unrest took increasingly violent form, including demonstrations in several Argentine cities.

116. See M. HASTINGS & S. JENKINS, *supra* note 5, at 53 ("Relations between departments in Mrs. Thatcher's government had, by spring of 1982, become utterly dominated by budgetary considerations.").

117. FRANKS REPORT, *supra* note 29, para. 114.

118. *Id.* para. 115 ("The people of the Falkland Islands . . . express extreme concern that Britain appears to be abandoning its defence of British interests in the South Atlantic and Antarctic at a time when other powers are strengthening their position in these areas.").

119. *Id.* para. 116.

ture, not as an expedient measure.¹²⁰

These events offered Argentina a firm basis for its signalling claim. After successfully challenging the seriousness of Britain's sovereignty claim, the Argentine government ordered a full invasion of the Falklands and Dependencies. However, since the British did not explicitly communicate their intentions to the Argentines, the question remains whether Britain's pattern of signals not only makes Argentina's claim plausible but justifies it. Are there norms of signalling territorial claims which explain the parties' activities in such a way as to make one claim more persuasive than the other? The first step must be to outline what these norms of signalling territorial claims are, by tracing their development in international law.

IV. Conflicting Conceptions of Lawfulness

The British and Argentine claims formulated above do not differ in their underlying conception of lawfulness. They do differ in how they characterize the facts of the dispute, i.e., whether Britain's signals indicated an *animus derelinquendi* and acquiescence in increasingly bold Argentine displays of authority over the Falklands. The conflict between the parties thus centers on the extent to which the norms apply rather than on the norms themselves. Both parties, explicitly or implicitly, recognized the role of signalling in such disputes.

The body of customary international law relating to signalling territorial claims, which forms the basis of any interpretation of an adversary's signals, has been inherited by both countries. It is not unreasonable to presume that the legal advisers to the respective foreign ministries consulted, or at the very least could have consulted, this body of precedent when assessing the other party's intentions or when formulating a response which would signal their own.

A recent indication of customary international law with respect to signalling territorial claims is the Juridical Regime of Historic Waters of 1962, in which the United Nations International Law Commission restated customary international law regarding the acquisition of historic title to *maritime* areas:

There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the con-

120. *Id.* ("[Argentines] did not see it as an inevitable economy in Britain's defence budget since the implications for the Islands . . . were fundamental.").

tinuity of this exercise of authority; (3) the attitude of foreign states.¹²¹

The International Law Commission noted that the exercise of authority by the claimant state "must have continued over a considerable time; indeed it must have developed into a usage" in order to satisfy the second requirement above.¹²² Regarding the third and admittedly "more controversial" factor, the Commission stated that "[s]ome writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient."¹²³ However, the Commission did not define a standard for acquiescence or absence of opposition; the document therefore does not offer any guidelines to resolve the central issue of this incident.

In the *Eastern Greenland Case*¹²⁴ the Permanent Court of International Justice had enunciated norms of acquiring sovereignty which bear on the Falklands incident. The case involved a dispute between Norway and Denmark over an occupation of territories in Eastern Greenland by Norwegian hunters, and an accompanying Norwegian Royal Resolution which vested Norwegian "police powers" in designated local representatives in the region.¹²⁵ The Court identified the two elements necessary to establish sovereignty based on continued display of authority: "the intention and will to exercise such sovereignty and the manifestation of State activity."¹²⁶ The Court also concluded that certain commercial treaties with third states showed "a willingness on the part of the States with which Denmark has contracted to admit her right to exclude Greenland" as Danish territory.¹²⁷ Moreover, the treaties could "be regarded as demonstrating sufficiently Denmark's will and intention to exercise sovereignty over Greenland."¹²⁸

The Court held that Norwegian protests did not alter the sovereign character of those acts, and declared unlawful the Norwegian occupation. Because the facts of this case are inverted in the Falklands incident—in particular, Argentina and Denmark are in opposite roles—the holding is relevant to this Article mainly for its recognition of commercial treaties with third parties as a means of establishing sovereignty.

Displays of sovereignty by one state and acquiescence by another were

121. Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y.B. INT'L L. COMM'N 1, 13, para. 80, U.N. Doc. A/CN.4/143/1962.

122. *Id.*

123. *Id.*

124. (Den. v. Nor.), 1933 P.C.I.J., ser. A/B, No. 53 (Judgment of Apr. 5, 1933).

125. *Id.* at 42-43. The Norwegian occupation had occurred in the context of a long historical dispute.

126. *Id.* at 63.

127. *Id.* at 51.

128. *Id.* at 52.

decisive factors in the acquisition of title in the *Island of Palmas Case*.¹²⁹ The United States founded its claim to an island off southern Mindanao on principles of discovery, recognition by treaty,¹³⁰ and contiguity.¹³¹ The Netherlands based its claim on peaceful and continuous display of state authority over the island, which, according to the arbitrator, “would in international law prevail over a title of acquisition of sovereignty not followed by actual display of State authority.”¹³²

With regard to the length of time of the display of sovereignty, the Arbitrator noted that although

there are considerable gaps in the evidence of [Dutch] continuous display . . . it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.¹³³

Again, although the facts of *Island of Palmas* are inapposite to those of the Falklands incident, the case further proves that signalling processes form part of the customary norms relating to territorial claims which bear on the actions of Great Britain and Argentina.

The other reference point in customary international law regarding signalling norms is the *Clipperton Island Case*.¹³⁴ In that case, the arbitrator held that France had given sufficient public “notoriety” to its 1858 unilateral declaration of sovereignty over an island some 570 miles southwest of Mexico to constitute constructive notice upon Mexico of the French claim.¹³⁵ Although France never occupied the island after promulgating its sovereignty claim, an 1897 Mexican occupation of the island was held invalid because there was “no reason to suppose that France . . . subsequently lost her right by *derelictio*, since she never had

129. (U.S. v. Neth.), 2 R. Int’l Arb. Awards 829 (1929).

130. By the Treaty of December 10, 1898, T.S. No. 343, 30 Stat. 1754, Spain ceded the Philippines to the United States.

131. 2 R. Int’l Arb. Awards at 837.

132. *Id.* at 867.

133. *Id.* The arbitrator continued:

It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial Power over a native State, and in regard to outlying possessions of such a vassal State.

Id.

134. (Fr. v. Mex.), reprinted in 26 AM. J. INT’L L. 390 (1931).

135. *Id.* at 394.

the *animus* of abandoning the island.”¹³⁶

V. International Appraisal of Lawfulness

The international community did not apply norms of tacit communication in its evaluation of the merits of the parties' claims. Since neither party to the dispute publicly addressed the question of whether Argentina could justifiably interpret prior British actions as acquiescence in the Argentine claim to title, the international community did not have the opportunity to consider such a contention.

Individual states and other international actors frequently make policy judgments on the basis of signals and precedents.¹³⁷ The international appraisal of the lawfulness of the Argentine invasion would not be harsh if British signals were shown to have in some way invited such an invasion.

VI. Outcome

The outcome of the Falklands incident, in the first instance, was a total British military victory and recapture of the Falklands and Dependencies. By the magnitude and scope of its military outcome, that recapture probably overshadows all prior incidents in the area. These events broke a more or less constant line of precedent, indicating British acquiescence in the face of Argentine territorial impositions. The official British position on sovereignty now includes territorial control as a source of legitimacy for their claim of title to the Falklands.

VII. Writer's Appraisal

In analyzing the parties' interpretation of each others' signals, it should be kept in mind that both sides viewed the regional territorial dispute comprehensively. It would be tempting to distinguish formally between the Falkland Islands and the Dependencies and conclude that official Argentine displays of authority took place on Dependencies but not on Falklands soil. However this distinction would be misleading: the whole region, Falklands and Dependencies, was the subject of a single dispute. Neither the pattern of signals nor official policy drew serious distinctions between one archipelago and the other.

From the Argentine point of view, British governments signalled almost consistently that the United Kingdom was not serious about keep-

136. *Id.*

137. See e.g., G. SNYDER, *supra* note 1, at 5-16 (use of signals to deter potential aggressors).

ing control of the disputed area. The British repeatedly acquiesced in specific Argentine assertions of authority, including the seizure of Dependencies' territory in Southern Thule and South Georgia, and the conclusion of a Soviet-Argentine economic cooperation treaty that implicitly recognized Argentine sovereignty over the Falklands. British governments concluded agreements with the Argentines establishing a special relationship between the Islanders and Argentina, including an exemption for Islanders from Argentine military service. As noted, these exemptions would be meaningful only if the Islanders were to become Argentines. Similarly, the British weakened their ties to the Islands by withdrawing *HMS Endurance* from South Atlantic service despite the March 1982 Argentine occupation of South Georgia and by enacting the 1981 Nationality Act that denied British nationality to many native Falklanders.¹³⁸ Therefore, considering the preceding discussion of international law and the facts surrounding the dispute—including the lack of British opposition to Resolution 2065 classifying the Falkland Islands among territories in the process of decolonization—it is reasonable to conclude that Britain signalled to Argentina that it was surrendering its sovereignty claim.

The British counterclaim acknowledges that this analysis has some merit, but asserts that Britain never signalled its readiness to acquiesce to an Argentine military occupation of the entire Falklands archipelago. Since the counterclaim relies heavily on assertions about what Britain *intended* to signal, resort must be made to British intelligence assessments, now made public in the *Franks Report*, to infer what the British government actually knew. Knowing what the government intended would help in assessing the reasons for the failure to communicate it.

The *Franks Report* states that shortly after the Southern Thule landing was discovered, British intelligence reported that the Commander-in-Chief of the Argentine Navy had probably approved the landing during the prior months.¹³⁹ Moreover, earlier that year the British Joint Intelligence Committee had reported that the new Argentine government was likely to have high expectations for the resolution of the Falklands dispute.¹⁴⁰ The British cannot credibly claim that they were uncertain whether the "scrap-metal dealers" on Southern Thule were instruments of Argentine authorities or that the deterioration of the dispute was a

138. M. HASTINGS & S. JENKINS, *supra* note 5, at 43-44; A. GAVSHON & D. RICE, *supra* note 23, at 11-12.

139. FRANKS REPORT, *supra* note 29, para. 52.

140. *Id.* para. 50.

surprise.¹⁴¹

On the other hand, there are indications that the British government still intended the eventual settlement of the dispute to be a peaceful one. After the Southern Thule incident, British policy was to retain sovereignty for as long as possible, while making piecemeal concessions to the Argentines on maritime resources and the Dependencies.¹⁴² In that manner, the British government hoped to buy time to persuade the British public to accept concessions on sovereignty.¹⁴³ Whitehall saw a joint leaseback alternative, linked to economic cooperation, as the most likely solution to the dispute.¹⁴⁴

After the Thatcher government came to power, it decided at first to pursue the same policy. Its review of British options listed three possibilities: (i) "Fortress Falklands," (ii) no concessions on sovereignty while negotiations dragged on, and (iii) substantive negotiations on sovereignty.¹⁴⁵ Lord Carrington persuaded the Defence Committee to explore the third option as the only one which could avert an Argentine military "invasion,"¹⁴⁶ but Islander objections derailed any renewed consideration of a leaseback option in early January 1981.¹⁴⁷ As a result, it appears that British policy reverted to option (ii). The British pursued this course despite the knowledge—demonstrated in the Defence Committee's rationale for preferring option (iii)—that option (ii) was not likely to avert an Argentine military response. British policy towards the Falklands in early 1982 took a risk on the possibility of Argentine military action, although it conceded nothing on sovereignty and provided inadequately for the islands' defense. At best, that was a confusing policy.

Conclusion

The Argentines did not anticipate that their invasion would shock the British government into a fundamentally different mode of operation, rendering all previous signals and expectations irrelevant. There were in

141. British intelligence also had concluded that although the Argentine military had refrained earlier from carrying out adventurist acts that would increase President Perón's popularity, its seizure of power had freed it from that constraint. FRANKS REPORT, *supra* note 29, paras. 41, 49, 50. See also *id.* para. 75 (On October 12, 1979, Lord Carrington told the Prime Minister and other Defence Committee members that "continuing talks but without making any concessions on sovereignty . . . carried a serious threat of invasion.").

142. *Id.* para. 61.

143. *Id.*

144. *Id.*

145. *Id.* para. 73.

146. *Id.* paras. 75, 80.

147. *Id.* para. 83. (Falklands Joint Council urged that "the British delegation should seek an agreement to freeze the dispute over sovereignty for a specified period of time").

fact no rules of conduct gleaned from signals which could say what Britain would do in the event of a large Argentine military occupation.

The inherent imprecision of tacit communication is apparent. A signal by definition is sent without a memorandum explaining its exact meaning as applied to various fact situations. Parliamentary opposition forced British cabinets to resort to tacit communication, a medium which could not accurately express the limits of British acquiescence to Argentine expansion.¹⁴⁸

The expectations established by British signals in the South Atlantic probably would have supported other Argentine actions short of invasion of the Falklands. For example, it seems that Britain would have done nothing to prevent quiet Argentine exploitation of fishing resources in Falklands waters. Similarly, the dispute in 1980-81 over oil exploration

148. Complex reasons, including divided authority within the British government, occasional bureaucratic irrationality, and inherent imprecision of tacit communication, underlay the Cabinet's decision. First, the demands of the House of Commons that the Islanders' wishes be guaranteed before any transfer of sovereignty could take place conflicted with Foreign Office policy as expressed in Resolution 2065 and in subsequent British acquiescence to Argentine displays of sovereign authority. See *supra* note 26.

The origins of this conflict between the Commons and the Cabinet can be traced to the government row over the Memorandum of Understanding. The Memorandum's importance became evident in subsequent years. Britain seemed to follow two conflicting policies with regard to the Falklands dispute. After the Memorandum of Understanding was abandoned, the official position followed Commons's demands that Britain would transfer title only with Islander consent. Nevertheless, British actions unofficially signalled an unconditional though gradual withdrawal of British interests and a general British *animus derelinquendi* towards the territory and its inhabitants.

Who was speaking for Britain and under what authority? Again there are formal and informal approaches to the problem. The Cabinet formally charged the Foreign Office with Falklands policy and the Defence Ministry with their defense against armed threat. But the Commons exercised a practical check on the Cabinet's ability to speak for Britain. The distribution of political authority between Whitehall and Westminster depended on the factual circumstances in which authority would be exercised. On April 2, 1982, with the invasion of British-held territory causing a national crisis, the House of Commons forcefully demanded that the Prime Minister choose between action and resignation. See *WAR IN FALKLANDS*, *supra* note 6, at 98 ("[t]here was only one way she could respond: by promising to get the islands back").

A second cause of ambiguity is the irrationality common to modern bureaucracies. Relatively mundane decisions, such as whether to take an icebreaker out of service, or whether to permit a few chauvinists to wave Argentine flags over remote rocks, can be inconsistent with the national interests of a complex state. The overwhelming importance of cost-cutting in the British bureaucracy during Sir Geoffrey Howe's tenure at the Exchequer made a rational decision about keeping *HMS Endurance* in service impossible at a crucial juncture in the dispute. See M. HASTINGS & S. JENKINS, *supra* note 5, at 53. In context, Lord Carrington's view that decommissioning *HMS Endurance* would weaken the British sovereignty claim could have been seen as an argument of special interests against cost-cutting measures.

The budgetary pressures which conditioned the March 1982 decision to decommission the *Endurance* became totally irrelevant within a few days. The Argentine invasion abruptly reordered official priorities; national interests that had been compromised earlier suddenly became the overriding national concern.

in Magallanes Este¹⁴⁹ was unlikely to provoke a serious British challenge to Argentine oil activity, as opposed to a challenge to private oil company drilling or production. The British probably would have lost much more in economic terms than they could have gained by destabilizing the military situation around the Falklands. The *Shackleton Report* noted that it would not have been realistic for Britain to develop Falklands oil or fishing resources without Argentine cooperation.

In sum, the operative limitations on Argentina centered less on tactical particulars, such as whether Argentina could set up a base covertly in populated Falklands territories, than on the British government's fundamental need to avoid public humiliation. Britain's actions were irresponsible in that they communicated opportunities for Argentina but gave little or no hint of the limitations. Such limitations could have been signalled, for example, by a substantial strengthening of the British garrison on the Falkland Islands after the Southern Thule incident. The incident shows that the process of signalling requires communication of both opportunities and limits in order to avoid unintended and potentially dangerous misunderstandings.

Having established what Britain was in fact signalling to Argentina, one should now address the last questions: How did this incident affect the norms of international tacit communication? Have those norms been strengthened or weakened?

The outcome of this incident will probably weaken international confidence in the process of signalling. Ruling elites tend to judge by concrete results, and their willingness to rely on a norm depends on its past performance.¹⁵⁰ The result of Argentina's reliance on the norms in this Incident was armed conflict, reversion to the status quo ante regarding effective British control of the Falklands, and ultimately the fall of the Argentine government.¹⁵¹ Moreover, given the accumulation of British signals, the Argentine government could not be accused of incompetence in interpreting them.

The Falklands incident thus appears to have exposed fundamental defects in the norms of territorial signalling. The utility of signals depends in large part on their ability to tacitly communicate true intentions. If governments cannot speak with credibility at the level of generality on which signals operate, then the credibility of signals suffers. If govern-

149. A. SILENZI DE STAGNI, *supra* note 90, at 138-42. See also Report of the Special Committee, *supra* note 4, at 28-29.

150. See Reisman, *The Incident as a Decisional Unit in International Law*, 10 YALE J. INT'L L. 3 (1984) ("[n]aturally, the weight accorded prescriptive norms will vary with . . . the effectiveness of the legal system enforcing the norms.").

151. WAR IN FALKLANDS, *supra* note 6, at 282.

ments are sometimes unable to take into account all relevant factors in deciding to send a signal, distinguishing between high national interests and secondary policy goals, then their signals may not be confidently relied upon to form expectations of their future behavior.

Signals shape international behavior and conceptions of lawfulness that affect common ideas of international law. The sequence of signals that passed between Britain and Argentina shaped conclusions of lawfulness on each side; international norms against the use of force were not exclusively, or even primarily, controlling. The parties alone determined which uses of force would obtain acquiescence. They created their own expectations by signalling, just as two parties create their own expectations in a contract defining a relationship of mutual rights and obligations. The dispute escalated into armed conflict partly because the language of their agreement—customary signalling norms—was too vague. Both parties made and acted on unilateral interpretations of the other's signals; norms of signalling, existing at a high level of generality, could not and did not provide adequate criteria to assess the bureaucratic, fiscal, and domestic political components of the signals. Whereas an international court or arbitral tribunal can apply territorial signalling norms with the discretion conferred upon it by the parties, the same indicators may be too imprecise to be an effective means of conflict limitation between states not bound by the interpretations of an authoritative third party.

Finally, if signals are the primary international language for the communication of state intentions, and if the decline of the post-1945 model of international order is being replaced by a *realpolitik* bilateral or multilateral contractarian model, then the general limits of signalling revealed in the Falklands incident suggest the limits of any contractarian model of international order. In order for there to be a meeting of the minds there must first be a common language.